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No. 06-11206

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE PETITIONER

PHILIP J. KAVANAUGH
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF ILLINOIS
JULIE MORIAN
650 Missouri Avenue
East St. Louis, IL 62201
(618) 482-9050

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

ROBERT N. HOCHMAN *
BRIAN D. RUBENS
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

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2 Dan B. Dobbs, *The Law of Torts* (2001) 18, 30
3 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 17, 30

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Joint Appendix at JA 90-95. The district court held a sentencing hearing on May 12, 2006, at which it orally ruled that defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The transcript of that hearing is reproduced in its entirety at JA 16-63.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Petitioner timely filed his petition on May 8, 2007. The petition was granted on April 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another ….

STATEMENT OF THE CASE

Petitioner's sentence was enhanced by more than five years pursuant to the Armed Career Criminal Act ("ACCA" or "Act"), 18 U.S.C. § 924(e)(1), based on the view that the mere failure to report for periodic confinement is a "violent felony" within the meaning of the ACCA. That counterintuitive result is wrong. The "conduct" involved in failure-to-report escape is, in fact, no conduct at all. It is a crime of *inaction*. The passive inaction required to commit the offense cannot be the purposeful, violent and aggressive conduct that just last term in *Begay* v. *United States*, 128 S. Ct. 1581, 1586 (2008), this Court made clear is required by the definition of "violent felony." In addition, the portion of the definition of "violent felony" which the court of appeals held extends to petitioner's conviction for failure-to-report escape is limited to property crimes. Failure-to-report escape is

not a property crime. For each of these reasons, the judgment of the court of appeals should be reversed.

1. In July 1998, petitioner pleaded guilty to robbery and aggravated assault and to an unrelated drug possession charge. Sealed JA 107, 110. Part of petitioner's sentence included periodic confinement for 11 weekends in the Jefferson County, Illinois jail. *Id*. Petitioner failed to report for this periodic incarceration on November 27, 1998, December 4, 1998, December 11, 1998, and December 18, 1998. JA 67, 79.

Two months later, on February 17, 1999, petitioner was arrested and charged with "escape" under Illinois law. JA 68. He pleaded guilty.

The Illinois "escape" statute describes two distinct crimes, drawing "an express distinction between the act of 'escape' and that of 'failure to return.'" *People* v. *Bowden*, 730 N.E.2d 128, 142 (Ill. App. Ct. 2000). Failure-to-report (or failure to return from furlough or work-release) escape is a lesser crime than custodial escape.

> A person convicted of a felony or charged with the commission of a felony who intentionally escapes from any penal institution or from the custody of an employee of that institution commits a Class 2 felony; however, a person convicted of a felony who knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement is guilty of a Class 3 felony.

720 Ill. Comp. Stat. 5/31-6(a).[1]

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[1] Similarly, federal law and the law of 31 other states, expressly distinguishes failure-to-report (or failure-to-return) from escape from confinement. *See* 18 U.S.C. §§ 751, 3146; Ala. Code §§ 13A-10-32, 14-8-42; Alaska Stat. §§ 11.56.310, 11.56.335; Cal. Penal Code § 4530(a) & (c); Conn. Gen. Stat. §§ 53a-169, 53a-170; Fla. Stat. §§ 944.40, 945.091(4); Ga. Code Ann. § 16-10-52(a)(1) & (5); Ind. Code Ann. § 35-44-3-5(a) & (c); Iowa Code § 719.4(1) & (3); La. Rev. Stat. Ann. § 14:110; Me. Rev. Stat. Ann. tit. 17-A, § 755; Md. Code Ann. Crim. Law §§ 9-404, 9-405; Mass. Gen. Laws ch. 268, § 16; Mich. Comp. Laws § 750.193; Miss. Code Ann. §§ 97-9-45, 97-9-49; Mo. Rev. Stat. §§ 575.200, 575.220; Mont. Code Ann. § 45-7-306(2); Neb. Rev. Stat. §§ 28-908, 28-912; N.H. Rev. Stat. Ann. §§ 642:6, 651:24; N.J. Stat. Ann. § 2C:29-5; N.Y. Penal Law §§ 205.10, 205.15, 205.16, 205.17; Nev. Rev. Stat. §§ 212.090, 212.095; N.C. Gen. Stat. § 148-45; N.D. Cent. Code §§ 12.1-08-05, 12.1-08-06; Ohio Rev. Code Ann. § 2921.34; Or. Rev. Stat. §§ 162.165, 162.205; 18 Pa. Con. Stat. § 5121; S.D. Codified Laws §§ 22-11A-2, 22-11A-2.1, 24-8-6; Tenn. Code Ann. §§ 39-16-605, 39-16-609(a); Vt. Stat. Ann. tit. 13, § 1501(a) & (b); Wis. Stat. §§ 946.42, 946.425; Wyo. Stat. §§ 7-13-702, 7-16-309, 7-18-112. In addition to Illinois, 12 states treat failure to report or failure to return as a lesser grade of crime than custodial escape. *See* Alaska Stat. §§ 11.56.310, 11.56.335 (Class C v. Class B); Cal. Penal Code § 4530(c) (does not count as a prior felony conviction in subsequent prosecution); Conn. Gen. Stat. §§ 53a-169, 53a-170 (Class D v. Class C, if working outside correctional institution and fail to return only); Ind. Code Ann. § 35-44-3-5(a) & (c) (Class D v. Class C); Iowa Code § 719.4(1) & (3) (Misdemeanor v. Class D); Me. Rev. Stat. Ann. tit. 17-A, § 755(1) & (1-C) (failure to report to furlough or rehab is Class D v. other escape, including failure to return is Class C); Md. Code Ann. Crim. Law §§ 9-404(c), 9-405(c) (failure to report is misdemeanor v. escape is felony); Mo. Rev. Stat. §§ 575.200, 575.220 (Class A misdemeanor v. Class D felony); Neb. Rev. Stat. §§ 28-908, 28-912 (failure to report is Class IV felony v. Class III felony); N.Y. Penal Law §§ 205.10, 205.15, 205.16, 205.17 (Class A misdemeanor or Class E felony v. Class E or Class D felony); S.D. Codified Laws §§ 22-11A-2, 22-11A-2.1 (Class 5 felony v. Class 4 felony); Vt. Stat. Ann. tit. 13, § 1501(a) & (b) (sentence of

The indictment charging petitioner with "escape" makes clear that he committed failure-to-report escape: "Deondery L. Chambers committed the offense of Escape in that said defendant, having been convicted of … a felony, knowingly failed to report November 27, 1998, December 4, 1998, December 11, 1998 and December 18, 1998, to the Jefferson County Jail, a penal institution, in violation of 720 ILCS 5/31-6(a), a class 3 felony." JA 68. The elements of failure-to-report escape are (1) conviction of a felony, subjecting an individual to incarceration for which he (2) knowingly (3) fails to report to the penal institution. Petitioner was not charged with escape from a penal institution or from the custody of a penal institution employee.

There is no suggestion that petitioner's arrest following his failure to report involved any altercation between him and anyone, including any arresting officer. Indeed, there is no suggestion that an arresting officer even had to seek out petitioner or forcibly place him in custody.

Petitioner was not sentenced to serve any additional time of confinement as a result of his failure-to-report escape. (He had to make up the four weekends for which he failed to report. JA 21.) Instead, petitioner was sentenced to six months in jail (which was stayed), 30 months of probation, and fines and costs. Sealed JA 113.

2. On May 31, 2005, petitioner was involved in an altercation during which he discharged a firearm into

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up to 5 years v. up to 10 years). Five states define the term "escape" to include failure to return. *See* Ariz. Rev. Stat. § 13-2501(4); Kan. Stat. Ann. § 21-3809(b)(2); Ky. Rev. Stat. Ann. § 520.010(5); Minn. Stat. § 609.485; Tex. Penal Code Ann. § 38.01(2).

the air. Sealed JA 101-03. Petitioner fled the scene in a car. As police pursued, petitioner threw the firearm out of the window. *Id.* The car eventually stopped, and petitioner and the driver were taken into custody. Sealed JA 101-02.

The government charged petitioner as a felon in possession under § 922(g). JA 10. The government later sought to enhance petitioner's sentence for the offense based on its assertion that he qualified as an armed career criminal under the Act. JA 12-13. For the enhancement to apply, the government had to prove that petitioner had three prior convictions for a "violent felony or serious drug offense." 18 U.S.C. § 924(e). There is no dispute that petitioner had two such prior convictions: a July 15, 1998 conviction in Illinois for robbery and aggravated battery[2] and a June 30, 1999 conviction in Illinois for unlawful delivery of a controlled substance within 1000 feet of public housing. JA 12-13. The government asserted that petitioner's conviction for failure-to-report escape provided the necessary third predicate crime.

3. Petitioner pled guilty to the felon-in-possession charge, but disputed that he was subject to the ACCA's enhancement based on his conviction for failure-to-report escape. As the district court acknowledged, the question was whether a prior conviction for failure-to-report escape is a "violent felony" under the ACCA. JA 20.[3]

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[2] Petitioner's sentence for periodic confinement, for which he failed to report, arose from this conviction.

[3] The higher-class felony of custodial escape under Illinois law was not the predicate offense. This Court considers the predicate offense as a "categorical" matter, which directs a court to "consider whether the elements of the offense," as defined by the relevant statute, "are of the type that would justify its inclusion"

"Violent felony" is defined in two clauses of the ACCA. 18 U.S.C. § 924(e)(2)(B)(i) & (ii). There is no dispute that failure-to-report escape is not a "violent felony" within the meaning of the first clause, which covers offenses having "as an element the use, attempted use, or threatened use of physical force against the person of another."

The second clause begins by enumerating specific offenses—burglary, arson, extortion, and crimes involving the use of explosives. Obviously, failure-to-report escape is not an enumerated offense.

The government sought to sweep failure-to-report escape within the scope of what can be referred to as the "residual subclause" of the second clause of the definition of violent felony in the ACCA. The residual language is a *sub*clause because it appears after the enumerated offenses in clause (ii) rather than in its own clause. The residual subclause covers crimes that, though not burglary, arson, extortion, or involving the use of explosives, "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." *Id*. § 924(e)(2)(B)(ii).

The district court decided that it was bound by *United States* v. *Bryant*, 310 F.3d 550 (7th Cir. 2002).

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as a predicate offense under the Act. *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007) (emphasis omitted); *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). Where, as here, the underlying statute describes more than one offense, *see supra* at 3-4 (discussing 720 Ill. Comp. Stat. 5/31-6(a)), a court may look to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to determine which was the predicate offense. *Shepard* v. *United States*, 544 U.S. 13, 15 (2005). In light of *Shepard*, and the charging document in the record, the court of appeals agreed that failure-to-report escape was the relevant predicate offense. JA 92.

In *Bryant*, the court of appeals refused to distinguish a failure to return to a halfway house from a custodial escape in determining whether the ACCA's sentencing enhancement applied. *Id.* at 553-54. In light of *Bryant*, the district court concluded that "escape is escape[] [a]nd we're not going to get into the nuances of it for the purposes of the sentencing statute. It counts. So we have here what is a career offender under the statute." JA 52.

Having determined that petitioner was an armed career criminal under the Act, the district court also applied Section 4B1.4 of the Sentencing Guidelines, which incorporates the same standards as the ACCA. This produced a guidelines range of 188 to 235 months. JA 55. The district court sentenced petitioner to 188 months, which is slightly more than the 15-year mandatory minimum required by the ACCA. JA 60. Had petitioner not been treated as an armed career criminal, he would have been subject only to § 922(g)'s unenhanced statutory maximum of 120 months. 18 U.S.C. § 924(a)(2).

4. Petitioner appealed his sentence to the Seventh Circuit, which affirmed. The court of appeals acknowledged that "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often involves conduct that presents a serious potential risk of physical injury to another." JA 91 (internal quotations omitted). Yet, citing *Bryant* and even more recent circuit precedent, the panel determined that the distinction between custodial and failure-to-report escapes had been rejected, and that "for now" there was no reason to reconsider those decisions. JA 93.

The panel observed that the reasoning that has been employed to treat all escapes—custodial as well as failure-to-report—as presenting identical risks is based on "conjecture floating well free of any facts." JA 94. The panel considered the very reasoning by which it was bound "an embarrassment to the law." JA 93.

The Seventh Circuit issued its decision before either of this Court's two recent decisions, *James* v. *United States*, 127 S. Ct. 1586 (2007), and *Begay* v. *United States*, 128 S. Ct. 1581 (2008), considering the ACCA's definition of "violent felony." After deciding *Begay*, this Court granted certiorari in this case.

SUMMARY OF ARGUMENT

In *Begay*, this Court concluded that the residual subclause of the ACCA covers only those offenses that are similar to the enumerated offenses in those respects which led Congress to treat the enumerated offenses as exemplars of the kind of prior dangerous conduct it was targeting. The text, structure, drafting history, and purpose of the ACCA make clear that the residual subclause covers only those offenses that both involve conduct essential to commit the offense that is purposeful, violent and aggressive *and* target property. Failure-to-report escape satisfies neither criterion. It is not a "violent felony."

1. Because the conduct essential to commit failure-to-report escape is entirely *inactive*, it is not purposeful, violent and aggressive. The "act" of failing to report is itself without risk. It is far from the kind of dangerous conduct that characterizes the enumerated offenses and that likewise limits the scope of the residual subclause.

Conduct is purposeful, violent and aggressive when it shows that the offender is likely willing to harm another to carry out his plans by creating inherently dangerous circumstances similar to the circumstances created by the conduct essential to commit the enumerated offenses. The conduct involved in the enumerated offenses reveals the offender's willingness to harm another either through his awareness that a confrontation with another may occur in the course of committing the offense (as with burglary and extortion), or by unleashing a force that necessarily would harm others in the vicinity (as with arson or the use of explosives). To be included within the residual subclause, a predicate offense must "otherwise"—through some other conduct different from the conduct involved in the predicate offenses—create one or the other of these inherently dangerous circumstances. The conduct essential to commit failure-to-report escape creates neither.

Further, to determine whether an offense involves purposeful, violent and aggressive conduct, it is inappropriate to consider the potential for a violent confrontation with any law enforcement officials who may later seek to arrest the failure-to-report escapee. The conduct that must be purposeful, violent and aggressive is the conduct essential to commit the offense. That focus follows from the statutory text and is dictated by the categorical rule this Court has consistently applied. The purpose of the ACCA's sentencing enhancement also supports looking only to the conduct essential to commit the offense. The Act seeks to punish those whose criminal histories indicate that they have three times in the past demonstrated that they are willing to harm others to accomplish their plans, and thus are likely willing to do so again in the future. Because all offenses give

rise to a risk that law enforcement officials may seek later to arrest the offender, that possibility provides no way to distinguish among offenses. As a result, any inferences to be drawn about the likelihood of future willingness to harm others must be based upon conduct essential to commit the prior offense.

2. The residual subclause also should be limited to property crimes. All of the enumerated offenses target property: a burglar invades property, an extortionist seeks unlawfully to obtain property, and an arsonist or user of explosives unleashes a force that is inherently destructive of property. The structure of the two-clause definition of "violent felony" in the ACCA supports limiting the residual subclause to property crimes. Clause (i) expressly addresses crimes targeting persons, while clause (ii) addresses crimes targeting property that involve conduct that is also dangerous to persons, even though harm to persons may not be the object of the conduct. Indeed, if clause (ii) is not narrowed, and is read broadly to cover all purposeful, violent and aggressive crimes, including crimes targeting persons, then clause (ii) would swallow clause (i) in its entirety, rendering clause (i) superfluous. The drafting history of the ACCA confirms that Congress created clause (ii), including the residual subclause, to address property crimes that involve conduct that is inherently dangerous to persons.

3. Reading the residual subclause to cover only property crimes that involve purposeful, violent and aggressive conduct during the commission of the offense (*i.e.*, conduct that demonstrates that the offender is likely willing to harm others to carry out his plans) provides a standard which can be applied consistently by lower courts. Whether a crime targets property will often be easy to determine. And

requiring the crime to involve conduct that evinces an awareness of the prospect of violent confrontation, or that unleashes an inherently dangerous force, also meaningfully guides lower courts in evaluating whether predicate offenses are violent felonies. This approach also conforms with the decisions in *James* and *Begay*.

Any alternative approach rooted in the statistical likelihood of harm from a predicate offense would leave lower courts without meaningful standards to guide them. Data on the frequency of harm from the myriad offenses the government charges as predicate offenses often will be unavailable. Indeed, it is not even clear what frequency the ACCA would require to satisfy a numerical analysis because the government has produced no data demonstrating the *rate* of harm—the ratio of the number of incidents of harm and the number of occurrences of the crime—for the enumerated offenses. Courts cannot make reliable, consistent determinations when their standards require unknowable facts. To allow the ACCA's enhancement to turn on such standardless judgments would violate constitutional limitations on vague criminal laws and separation of powers.

4. Even if the numerical frequency of harm from a predicate offense remains a relevant consideration after *Begay*, there still would be no basis for concluding that failure-to-report escape is a "violent felony." The government has produced no data concerning the number of occasions that failure-to-report escape results in harm to others. Under neither of the numerical-based methods of applying the residual subclause proposed by members of this Court would it be possible to hazard anything more than a guess as to whether Congress intended to include failure-to-report escape within the scope of

the ACCA. Under these circumstances, the rule of lenity requires excluding the offense from the Act.

ARGUMENT

As this Court already has held, the residual subclause embraces only those offenses that are "similar" to the enumerated offenses. *Begay*, 128 S. Ct. at 1585. Offenses covered by the residual subclause are similar to the enumerated offenses in those respects pertinent to why Congress singled out the enumerated offenses as exemplars. *See Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffler*, 537 U.S. 371, 384 (2003) (the canon of statutory construction *ejusdem generis*, which applies where general words follow more specific terms, construes "general words [in a statute] to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (internal quotation marks omitted).

There are two respects in which the enumerated crimes are exemplars of the kind of dangerous prior conduct that concerned Congress: (1) they involve purposeful, violent and aggressive conduct during the commission of the offense, in that they create certain circumstances that evince an offender's willingness to harm others to carry out his plan, and (2) they are property crimes. Only a crime similar to the enumerated offenses in *both* respects can be a "violent felony" within the meaning of the residual subclause. Although the crimes covered by the residual subclause will "otherwise" be different from the enumerated offenses, *Begay*, 128 S. Ct. at 1586 (stating that the word "otherwise" in the residual subclause "*can* … refer to a crime that is similar to the listed examples in some respects but different in

others"), they must be similar in these respects. Failure-to-report escape is similar in neither respect.

I. FAILURE-TO-REPORT ESCAPE IS NOT A VIOLENT FELONY BECAUSE IT DOES NOT INVOLVE PURPOSEFUL, VIOLENT AND AGGRESSIVE CONDUCT.

The conduct involved in committing failure-to-report escape is not purposeful, violent and aggressive. The conduct essential to commit the offense involves riskless inaction. It is even less similar to the enumerated offenses than is driving under the influence.

A. The Inaction Essential To Commit Failure-To-Report Escape Is Too Unlike The Enumerated Offenses To Be A Violent Felony.

1. The most fundamental reason why failure-to-report escape cannot be a "violent felony" is that it involves *doing nothing*. Even driving under the influence typically involves some act that itself poses some degree of danger to others. *Id*. at 1588 (noting the "seriousness of the risks attached to driving under the influence"); *id*. at 1594 & nn.2, 3 (Alito, J., dissenting) (citing statistics on driving under the influence fatalities and injuries). But the same cannot be said of failure-to-report escape. The crime is committed by a *failure* to act. The moment the time to report passes, the crime has been committed. One could be traveling to the prison, perhaps delayed by traffic, at the time the crime is committed. *See* JA 91 (noting crime is committed even if offender is merely "an hour late"). The defendant could even be asleep at the time he commits the crime. Even if sleeping while committing failure-to-report escape is a "hypothesize[d] unusual case[]," it remains true that

in the "ordinary case" the "conduct encompassed by the elements of the offense," *see James*, 127 S. Ct. at 1597, is entirely innocuous. *Inaction* is the very antithesis of purposeful, violent and aggressive conduct. It cannot be the kind of conduct Congress had in mind when it sought to single out the most dangerous offenders for especially long sentences. *Begay*, 128 S. Ct. at 1588 (the Act targets those with "a prior record of violent and aggressive crimes committed intentionally").

In *Begay*, this Court emphasized that felony driving under the influence is a strict liability offense, and hence does not involve the kind of purposeful conduct at which the definition of "violent felony" aims. 128 S. Ct. at 1588. Even assuming that a crime that requires a mere *knowing* violation (rather than a *specific intent* to commit a crime) can satisfy *Begay*'s standard, the fact that failure-to-report escape involves *inaction* means it is even further afield than driving under the influence from the kind of purposeful, violent and aggressive conduct at which the ACCA aims.

2. Through the definition of "violent felony," Congress sought to identify those whose prior criminal conduct indicates that the offender is the sort of person who might later seek "deliberately to harm a victim." *Id*. at 1586.[4] Clause (i) covers those crimes that target harming an individual. 18 U.S.C.

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[4] An offender's criminal history is commonly used to identify a potential for future dangerousness. *See Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998) (noting that "prior commission of a serious crime … is as typical a sentencing factor as one might imagine"); *Spencer* v. *Texas*, 385 U.S. 554, 571 (1967) (Warren, C.J., dissenting in two cases and concurring in a third) (offenders' "past conduct indicates their propensity to criminal behavior").

§ 924(e)(2)(B)(i) (a violent felony includes crimes that have "as an element the use, attempted use, or threatened use of physical force against the person of another"). Clause (ii) covers those offenses that, while not targeting harm to others, nonetheless create inherently dangerous circumstances that evince a willingness to harm others to carry out one's plan. As this Court emphasized, the Act is not concerned with those whose prior criminal histories reveal mere recklessness toward the risks of harm to others. *Begay*, 128 S. Ct. at 1587 (specifying that the crimes of recklessly tampering with consumer products, 18 U.S.C. § 1365(a), and inattention to duty by seamen causing serious accidents, *id.* § 1115, are not "violent felonies" within the meaning of the Act). It is the conscious awareness of the dangerous circumstances being created which supports the inference that the offender is likely willing to harm others to carry out his plans. The enumerated offenses were included as exemplars of just this sort of dangerous conduct.

As this Court recognized, Congress singled out burglary because it deemed the offense "inherently dangerous." *Taylor* v. *United States*, 495 U.S. 575, 585 (1990) (quoting *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. of the Judiciary*, 99th Cong. 15 (1986) ("House Hearing")). By *inherently* dangerous, this Court understood that Congress was focused on the dangers to others that arise "in the course of committing" burglary, House Hearing at 14, and specifically on the possibility of a confrontation between the offender and "people who might be inadvertently found on the premises." House Hearing at 26, *cited in Taylor*, 495 U.S. at 585; *James*, 127 S. Ct. at 1594-95 (stating that the possibility of confrontation during the commission of

a burglary is the "main risk" that explains why burglary was identified as a "violent felony" in the Act). The fact that a burglar carries out the crime with "awareness of th[e] possibility" that he may, in the process of committing the crime, find himself in a "violent confrontation" with "an occupant, caretaker, or some other person who comes to investigate" suggests "that he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor*, 495 U.S. at 588.

Extortion, like burglary, is inherently dangerous in that the offender is consciously aware of the potential for a confrontation with another in the process of committing the crime, which suggests that he likely is prepared to harm another to carry out his plan. In fact, extortion often involves an *expressed* threat of physical harm to the person or the property of another. 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.4(a)(4) (2d ed. 2003) ("Virtually all of the [extortion] statutes cover threats to injure (i.e., to cause bodily harm to the person or to damage the property of) the victim or some other person."); Model Penal Code § 223.4 (2008) ("A person is guilty of theft [by extortion] if he purposely obtains property of another by threatening to … inflict bodily injury on anyone …."). It would be difficult to imagine a better indication that the offender is willing to harm another to carry out his plans. *James*, 127 S. Ct. at 1607 (Scalia, J., dissenting) (observing that "[t]he extortionist … has already expressed his willingness to commit a violent act").

The conduct involved in committing arson and crimes involving the use of explosives is inherently dangerous for a more obvious reason. The conduct involved in committing those crimes *necessarily* exposes others in the vicinity to dangerous

circumstances. House Hearing at 23 ("offenses like arson or the use of explosives" are "activities which pose severe inherent danger to human life even if the property [targeted] is believed to be unoccupied") (statement of Mr. Knapp). This is precisely the kind of conduct that tort law has long recognized is "inherently dangerous," and has singled out for a heightened degree of responsibility because "harms … are more or less inevitably associated with" the use of explosives. 2 Dan B. Dobbs, *The Law of Torts* § 346, at 950 (2001). As the government has recognized, "arson and explosives use … present[] a risk of injury to others by exposing the public to an inherently dangerous activity." Brief of the United States at 19, *Begay* v. *United States*, No. 06-11543 (U.S. filed Dec. 3, 2007) ("U.S. *Begay* Brief").

In sum, with arson and use of explosives, the offender undertakes conduct that unleashes a force that is necessarily harmful to any individuals who may be in the vicinity. With burglary and extortion, the conduct gives rise to such a substantial risk of confrontation that the offender may be deemed aware of that risk, thus indicating that he likely would be willing to harm another to carry out his plans. The enumerated offenses thus all involve inherently dangerous conduct. As the government itself has argued, the Act is concerned with prior convictions involving conduct that "put[s] the public at risk, and … demonstrate[s] that [the offender has] little regard for the safety and well being of others." *Id*. at 34.

The conduct necessary to commit failure-to-report escape tells us nothing about the offender's regard for the safety of others. It is not inherently dangerous in any sense. Unlike arson or the use of explosives, nothing in the conduct necessary to commit failure-

to-report escape directly exposes the public to a necessarily harmful force. And, unlike either burglary or extortion, nothing in the conduct necessary to commit failure-to-report escape gives rise to a risk of confrontation in its commission such that one could conclude that the offender likely would use violence to carry out his plans. Because the offense is committed by *inaction*, there is no risk of confrontation during its commission. The commission of the crime is all but risk-free.

B. Any Possibility That Harm To Others Could Occur If Law Enforcement Officials Attempt To Arrest A Failure-To-Report Escapee Does Not Transform The Crime Into A Violent Felony.

Neither the lower courts nor the government have, as yet, argued that the conduct encompassed by the elements of failure-to-report escape creates *any* risk of harm to others. The risk of harm, it has been argued, arises from the potential for violence during any effort at subsequent recapture by law enforcement. In an oft-quoted passage, the Tenth Circuit reasoned that

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who *escapes from a jail* is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant *escapes from a jail* by stealth and injures no one in the process, there is still a serious potential risk that injury will

> result when officers find the defendant and attempt to place him in custody.

United States v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (second and third emphases added) (internal citation omitted). Even though, by its terms, this reasoning applied only to those who escape from a secure penal institution, courts (like the Seventh Circuit) have extended its reasoning to those offenders, like petitioner, who merely failed to report to a penal institution, or, similarly, failed to return from a work-release program, halfway house, or comparable setting where they were not subject to any physical constraint. Pet. 9-11 (citing cases). That extension cannot withstand scrutiny, especially in light of *Begay*.

1. To determine whether escape is a "violent felony" it is wrong to look to any risk of harm that arises when law enforcement officials attempt to recapture an escapee. The conduct that must be purposeful, violent and aggressive for a predicate crime to be a "violent felony" is "the conduct encompassed by the elements of the offense." *James*, 127 S. Ct. at 1597; *Begay*, 128 S. Ct. at 1584 (emphasizing that courts should "consider the offense generically, that is to say … in terms of how the law defines the offense"). As *Begay* recognized, a focus on the conduct essential to commit the offense is dictated by this Court's long-established "categorical" approach to the ACCA's "violent felony" provision. 128 S. Ct. at 1584 (citing *Taylor*, 495 U.S. at 602).

Requiring the purposeful, violent and aggressive conduct to relate to the conduct essential to commit the offense finds support in the text of the ACCA and its recognized purpose. By the terms of the Act, the "conduct" "involve[d]" in the crime must be what "presents a serious potential risk of physical injury to

another." 18 U.S.C. § 924(e)(2)(B)(ii). And, as discussed above, the purpose of the enhanced penalty provision of the ACCA is to single out those individuals whose criminal histories reveal not just "a degree of callousness toward risk," but also a willingness to engage in certain conduct under circumstances where the risk of harm to others is consciously known. *Begay*, 128 S. Ct. at 1587; *Taylor*, 495 U.S. at 588. The enumerated offenses indicate that Congress was focused on the dangers that inhere in the conduct essential to commit the offense. *Taylor*, 495 U.S. at 590.

In short, the conduct essential to commit the offense tells us what we need to know about the offender's willingness to harm others. As the government has argued, no "'subsequent volitional choice (only tangentially related to the offense…)'" should be considered to indicate the offender's willingness to cause harm to another. U.S. *Begay* Brief at 21 (explaining why felon-in-possession is not a violent felony under the ACCA) (quoting *United States* v. *Rutherford*, 54 F.3d 370, 377 n.15 (7th Cir. 1995)). That is, a court should not look beyond the conduct essential to commit the offense and impute to the offender a willingness subsequently to act dangerously. If the conduct encompassed by the elements of the offense does not indicate the offender's willingness to harm others, then the offense is not a "violent felony."

2. If courts were permitted to consider the potential for a violent confrontation arising out of a later attempt to arrest an offender by law enforcement, then the ACCA's residual subclause would transform all offenses into violent felonies. *Every* crime involves some risk of confrontation between law enforcement and the offender during

any subsequent effort to arrest the offender. And *every* such confrontation potentially could turn violent. If that risk alone were sufficient to treat an offense as a "violent felony" under the ACCA, then even purely financial felonies would be violent felonies. Even a financial crime of inaction, like Internal Revenue Code § 7202, 26 U.S.C. § 7202, which makes it a felony willfully to fail to collect or pay over taxes subject to withholding, would become a "violent felony." Likewise, the ACCA would extend to a failure-to-report financial crime like the willful failure to report various monetary transactions. *See* 31 U.S.C. §§ 5313, 5316 & 5322(a). No felony would escape the reach of the Act.

Any approach to the definition of "violent felony" that would sweep all crimes within its ambit must be wrong. *See United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting interpretation of statute that "would produce results that were not merely odd, but positively absurd"). We know from the Act's lengthy drafting history that Congress struggled over the proper way to define the scope of the Act. *See Taylor*, 495 U.S. at 582-84 (enumerating the multiple iterations of the predicate offense definition). A reading of the Act that treated any kind of escape as a "violent felony" simply because of the risk of confrontation with law enforcement *after* the escape occurred would render pointless the entire congressional enterprise of defining the term "violent felony." Such a reading must be wrong. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctant to treat statutory terms as surplusage in any setting. We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme ….") (internal quotation

marks, alteration and citations omitted); *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004) (rejecting an interpretation of crime of violence under 18 U.S.C. § 16 that would leave a portion of the definition "practically devoid of significance").

The definition of "violent felony" retains its meaning as a limitation on the scope of the ACCA's sentencing enhancement when the risk of harm to others remains focused on what occurs *during the commission of the offense*. Ultimately, what matters is what can be inferred about the individual who engages in the conduct necessary to commit the underlying offense. If his past conduct indicates a willingness to put himself in a position where he may need to harm others to carry out his plans, it is fair to conclude that in the future he would be the sort of dangerous individual who might "deliberately point [a] gun and pull the trigger." *Begay*, 128 S. Ct. at 1587. On the other hand, if the conduct necessary to commit the offense does not evince a willingness to harm others, then there is no basis for drawing the inference of future dangerousness.[5]

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[5] Whether custodial escape, *i.e.*, escape from physical constraints, is a "violent felony" is not the question before the Court. But whatever one concludes regarding custodial escape, there can be no doubt that the conduct essential to commit failure-to-report escape is less *inherently* dangerous than that of custodial escape. Custodial escape at least potentially involves a willingness to break free from physical constraints, and thus at least arguably evinces an awareness of the risk of confrontation with another in the course of committing the offense and a willingness to use violence if necessary to carry out one's plans. The same cannot be said of failure-to-report escape. It is completed before the possibility of confrontation even arises. No member of the public or law enforcement official in the presence of the offender would even be aware that, merely due to the passage of time, the offender has just committed a crime.

3. Although some states (including Illinois, *see People* v. *Miller*, 509 N.E.2d 807, 809 (Ill. App. Ct. 1987)), and federal law, *see United States* v. *Bailey*, 444 U.S. 394, 413 (1980), treat all escapes as "continuing" offenses, that designation, which is not uniform across all jurisdictions,[6] does not inform the inquiry here. Whether a state chooses to treat escape as a "continuing offense" does not change the conduct essential to commit the crime.[7] In Illinois, Colorado and Vermont, where the offense is continuing, the offender need do nothing more or less to commit failure-to-report escape than an offender in Florida, Michigan and Texas, where the offense is not continuing. Whether the offense is deemed "continuing" or not, there is still no basis to conclude that the offender is the sort of individual who has in the past and would in the future disregard the safety of others. Continuing to fail to report is no more indicative of a willingness to use violence and harm others than is initially failing to report.

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[6] *Compare*, *e.g.*, Colorado (Colo. Rev. Stat. § 18-8-201(2)), New Mexico (*State* v. *Martinez*, 781 P.2d 306, 309 (N.M. Ct. App. 1989)), *and* Vermont (*State* v. *Lewis*, 711 A.2d 669, 671-72 (Vt. 1998)), which treat escape as a continuing offense, *with*, *e.g.*, Florida (*Gaskin* v. *State*, 869 So. 2d 646, 647 (Fla. Dist. Ct. App. 2004)), Michigan (*People* v. *Mendoza*, 310 N.W.2d 860, 863-64 (Mich. Ct. App. 1981)), *and* Texas (*Spakes* v. *State*, 913 S.W.2d 597, 598 n.* (Tex. Crim. App. 1996) (per curiam)), which do not.

[7] The purposes of designating a crime a continuing offense include extending the statute of limitations, *see Toussie* v. *United States*, 397 U.S. 112, 121 (1970), making it possible to try the defendant in any venue where he may be found, *see United States* v. *Portillo-Vega*, 478 F.3d 1194, 1201 & n.9 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1442 (2008), and defeating a defense of duress or necessity (by requiring the defendant to return to custody as soon as the basis of his duress or necessity defense ends), *see Bailey*, 444 U.S. at 415.

Finally, the relative ease with which escape can be detected after it is achieved should play no role in determining whether any escape, much less failure-to-report escape, is a violent felony. It may be true that a prison or halfway house official is likely to notice the absence of an inmate or resident. But the *only* reason the likelihood of detection would even arguably be relevant is the potentially increased likelihood that law enforcement will be dispatched to track down the escapee, thus creating the possibility of a confrontation with law enforcement officials. For the reasons discussed above, that possibility is not the kind of potential for harm to which the ACCA is addressed. *Supra* at 21-23.

And even if it were relevant, that possibility *alone* could not be sufficient to warrant treating failure-to-report escape as a violent felony. First, it would be necessary to assess the likelihood that law enforcement would, in fact, be dispatched to track the escapee down. Even assuming that law enforcement officials would typically expend great effort to find a custodial escapee, it is far less urgent to locate an escapee who already enjoys substantial (yet incomplete) freedom to move about the community.[8]

For similar reasons, there is no reason to conclude that even *if* law enforcement officials were to seek to recapture a failure-to-report escapee, any such confrontation would produce violence or harm to anyone. That is because, as discussed above, *supra* at 20-21, what little one knows about a failure-to-report escapee from the conduct necessary to commit the offense provides no reason to believe he has used or

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[8] There is no indication in the record that anyone was dispatched to find petitioner on any of the four occasions he failed to report.

would use violence in the future. Nothing about the commission of, for example, the financial failure-to-report crimes identified above demonstrate an offender's indifference to the physical safety of others. Likewise, nothing about an offender's commission of failure-to-report escape demonstrates his indifference to the physical safety of others. When the conduct necessary to commit the offense itself provides no reason to believe that the offender has ever used force or even contemplated doing so to carry out his plans, there is no basis to believe the offender would use force in the future, even to defeat arrest for his offense.[9]

Indeed, to the extent we know anything at all about the likelihood of a failure-to-report escapee to behave violently, we have reason to believe it is relatively low. After all, we know from the fact that the offender was, at the time of his offense, permitted to move freely about the community that he was not considered to be dangerous enough to warrant secure confinement. In Illinois, criminal court judges routinely make public safety determinations when considering whether an offender should be released on his own recognizance or be permitted to post bail prior to trial. 725 Ill. Comp. Stat. 5/110-2 (requiring judge to consider whether the accused poses a "danger to any person or the community" in determining whether to allow individual released on own recognizance); *id*. 5/110-4 (for bailable offenses,

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[9] For this reason, any effort to distract from the conduct essential to commit the offense, and to focus on the possibility of later confrontation with law enforcement, ultimately fails. In the end, one must refer back to the conduct essential to commit the offense, and to identify purposeful, violent and aggressive conduct that inheres in those acts, to learn about the offender's willingness to use violence and harm others.

as to which a sentence of imprisonment is mandatory upon conviction, requiring judge to consider whether the accused poses a "real and present threat to the physical safety of any person or persons" in deciding whether to grant bail). There is no reason to believe that, in the exercise of a state criminal judge's sentencing discretion, *see* 730 Ill. Comp. Stat. 5/5-7-1 (describing authority to impose sentence of periodic imprisonment), public safety considerations go ignored in determining who will be permitted to serve a sentence of periodic confinement or work-release, as opposed to secure confinement. The fact that one of the few things we know about the failure-to-report escapee is that some public official determined that he need not be placed in secure custody undermines any basis for concluding that failure-to-report escape is a violent felony under the ACCA.

II. FAILURE-TO-REPORT ESCAPE IS NOT A VIOLENT FELONY BECAUSE IT IS NOT A PROPERTY CRIME.

Because the conduct essential to commit failure-to-report escape is not purposeful, violent and aggressive, the offense is not a violent felony under the ACCA. On that basis alone, this Court may reverse the Seventh Circuit's contrary judgment. In addition, failure-to-report escape is not a "violent felony" because it is not a property crime.

This Court has recognized that the crimes covered by clause (ii) are property crimes: "Congress sought to … defin[e the term 'violent felony'] to include both crimes against the person (clause (i)) and certain physically risky crimes against property (clause (ii))." *Begay*, 128 S. Ct. at 1586. That view is supported by the text and structure of the ACCA, along with the Act's drafting history, all of which make clear that

the residual subclause is aimed only at crimes that target property.

A. The Residual Subclause Of The ACCA Encompasses Only Crimes Targeting Property.

Limiting the residual subclause to property crimes is necessary to prevent it from rendering clause (i) of the definition of violent felony superfluous. The limitation is suggested by Congress's decision to place the residual subclause in the same clause (ii) as the enumerated offenses (all of which are themselves crimes targeting property), rather than in its own clause (iii). Finally, the drafting history strongly supports what the text and structure themselves dictate: that clause (ii) covers only crimes targeting property.

1. If the residual subclause covered *all* crimes that involve purposeful, violent and aggressive conduct, then clause (i) would be rendered superfluous. Clause (i) covers crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Every time an offender uses, attempts to use, or threatens to use physical force against another person, he is engaging in purposeful, violent and aggressive conduct. Therefore, if the residual subclause is not limited in some further way, it would swallow all the crimes that could potentially be covered by clause (i). *See Begay*, 128 S. Ct. at 1585 (stating "if Congress meant clause (ii) to include *all* risky crimes, why would it have included clause (i)," and noting that a broad interpretation of the residual subclause would seem to sweep the crimes described in clause (i) within the scope of clause (ii)).

It is a well settled principle of statutory interpretation that words in a statute should not be read to render other provisions mere surplusage. *Duncan*, 533 U.S. at 174; *Leocal*, 543 U.S. at 12; *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988). That principle has special force here, where the two provisions at issue are both parts of a single, comprehensive definition of a critical term in the statute. While the principle against rendering a statutory provision superfluous *can* give way to other competing considerations, *see Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 299 n.1 (2006) (accepting a potentially "superfluous" reading of statute where alternative would clearly contradict other language in the act); *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004) (concluding that it is "inappropriate" to "apply[] the rule against surplusage" when it will render a statute "ambiguous"), it would simply make no sense here to read one part of the definition of a term in a statute to swallow the other. *Leocal*, 543 U.S. at 12 (refusing to read one provision of a statutory definition to fully "encompass" another). Therefore, the scope of the residual subclause must be limited to some subset of all crimes that involve purposeful, violent and aggressive conduct.

Clause (ii)'s enumerated offenses shed light on the trait that distinguishes the residual subclause, and all of clause (ii), from the crimes covered by clause (i): all of the enumerated offenses are crimes targeting property. One who commits burglary seeks to invade some building or structure. *Taylor*, 495 U.S. at 598. Extortion is a form of theft, *i.e.*, its aim is to obtain money through some threat. Model Penal Code § 223.4; *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting). Arson is causing a fire or explosion aimed

at a "building" or other "property." Model Penal Code § 220.1(1) (2008); 3 LaFave, *supra* § 21.3(c), at 247-48. And crimes involving the use of explosives necessarily risk damaging any property in the vicinity of the explosion. *See Spano* v. *Perini Corp.*, 250 N.E.2d 31, 35 (N.Y. 1969) (noting in the context of legal use of explosives that "blasting involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person who engaged in such an activity to impose this risk upon nearby persons or property without assuming responsibility therefor"); 2 Dobbs, *supra* § 348, at 955 (noting that because of the particular risks posed, strict liability for explosives extends even so far as "vibration damage to property").

Clause (ii)'s focus on property crimes makes sense in light of the subject of clause (i). Clause (i) expressly covers crimes targeting persons. 18 U.S.C. § 924(e)(2)(B)(i) (covering crimes involving "physical force against the person of another").[10] But Congress recognized that the potential of armed career criminals to cause harm to others occurs not only when the offender targets another, but also when such an offender targets property. House Hearing at

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[10] This is not to say that the definition in clause (i) excludes property crimes that also target persons. For example, robbery, which has as an element the use of force against another, Model Penal Code § 222.1 (2008), targets both persons and property (and would, therefore, be included under either clause). The rule against surplusage is not offended if some crimes fall into both categories, so long as there are also some crimes in each category that do not fall into the other. *James*, 127 S. Ct. at 1606 (Scalia, J., dissenting); *United States* v. *Atl. Research Corp.*, 127 S. Ct. 2331, 2337 (2007) ("It is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction that threatens to render the entire provision a nullity.").

26 (testimony of Mr. Knapp); *James*, 127 S. Ct. at 1594 (stating that "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party").

That Congress included the residual subclause within clause (ii) shows that it does not cover crimes beyond the property crimes addressed in clause (ii). If Congress had intended to address risky crimes beyond those targeting persons (clause (i)) and property (clause (ii)), then it could have placed a residual provision in a clause (iii). Instead, Congress chose to include only two basic categories of offenses within the definition of violent felony: those targeting persons and those targeting property.

2. The textual and structural reading of the Act is amply confirmed by the Act's drafting history. As this Court has repeatedly recounted, the two-clause definition of "violent felony" in the ACCA was the product of congressional deliberation over how to expand the predicate violent-felony offenses under the ACCA from the original two offenses (robbery and burglary), *see* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185 (repealed 1986), to both crimes against persons and a broader array of crimes against property. *See Begay*, 128 S. Ct. at 1585-86; *Taylor*, 495 U.S. at 581-89.

The two-clause definition of violent felony emerged from two distinct bills, one introduced in the Senate and one in the House. *Taylor*, 495 U.S. at 583. The Senate bill defined "crime of violence" broadly, and left no doubt that crimes targeting both property and persons would be included. *See* S. 2312, 99th Cong.

(1986).[11] The House bill, by contrast, would not have covered crimes against property, except to the extent such crimes also have, as an element, the use, attempted use or threatened use of physical force against the person of another. H.R. 4768, 99th Cong. (1986).

The House devoted substantial attention to whether and how to include crimes "against *property* … in the definition of 'violent felony.'" H.R. Rep. No. 99-849, at 3 (1986). The language now reflected in the residual subclause emerged out of that debate. *Id.* (stating that agreed solution to "major question" regarding inclusion of property crimes was "to add … crimes punishable for a term exceeding one year that involve conduct that presents a serious potential risk of physical injury to others").

The bill introducing the language that ultimately became the residual subclause contained two clauses defining "violent felony" (as in the final version). The first (addressed to crimes against persons) was adopted verbatim as clause (i). *See* H.R. 4885, 99th Cong. (1986). However, the second clause, as introduced, contained only what became the residual subclause; it had no enumerated offenses. *Id.* Yet the House Report explains that the second clause is directed at dangerous property crimes, stating that it "adds all State and Federal felonies *against property* such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the

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[11] The Senate bill would have covered all crimes, not just felonies, which have as an element "the use, attempted use, or threatened use of force against either the person or property of another," in addition to felonies that involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." S. 2312.

conduct involved presents a serious risk of injury to a person." H.R. Rep. No. 99-849, at 5.

In the final version, Congress inserted the enumerated offenses (and the word "otherwise") in front of the residual subclause in clause (ii). The enumerated offenses were added without comment by any member of any committee and were unaccompanied by any new report. *See* H.R. 5484, 99th Cong. (1986); 132 Cong. Rec. H9479, H9495 (daily ed. Oct. 8, 1986) (first version of the bill introducing enumerated offenses). Still, the enumerated offenses are precisely those offenses that the House Report, which had introduced the language that ultimately became the residual subclause, indicated were the kinds of *property* crimes that the general language was intended to cover. *Compare* H.R. Rep. No. 99-849, at 5, *with* 18 U.S.C. § 924(e)(2)(B)(ii).

In sum, the drafting history of the ACCA reveals that (1) Congress was focused on which property crimes should be included as "violent felonies," (2) the residual subclause was drafted to define the scope of *property* crimes that should be covered before any enumerated offenses were included in the text, and (3) the enumerated offenses, along with the word "otherwise," were added without any indication that their inclusion would expand the subject-matter of the clause: dangerous property offenses.

B. Failure-To-Report Escape Is Not A Property Crime.

In light of the ACCA's text, structure, and drafting history, the residual subclause should be read to cover only property crimes. Failure-to-report escape is not a property crime. Nothing in the conduct essential to commit the offense has anything to do

with invading, unlawfully obtaining or causing damage to any property. It is, therefore, not a "violent felony" within the meaning of the residual subclause.

III. LIMITING THE RESIDUAL SUBCLAUSE TO PROPERTY CRIMES THAT INVOLVE PURPOSEFUL, VIOLENT AND AGGRESSIVE CONDUCT DURING THE COMMISSION OF THE OFFENSE PROMOTES CONSISTENT APPLICATION OF THE ACCA IN FUTURE CASES.

The residual subclause covers only property crimes that involve purposeful, violent and aggressive conduct—*i.e.*, conduct that evinces a likely willingness to harm others—during the commission of the offense. That reading best fits the text, structure, drafting history, and purpose of the Act, as well as this Court's decisions in *James* and *Begay*. In addition, that standard provides the most promise for consistent application of the ACCA in future cases. The administrability of the standard is an additional reason to adopt it.

1. To begin, limiting the residual subclause to property crimes—*i.e.*, those involving the physical invasion or unlawful acquisition of property, or conduct that necessarily would damage property—draws reasonably clear distinctions among offenses. It will often be a straightforward matter to determine whether the elements of the offense involve conduct that seeks physically to invade property or unlawfully to acquire property from another. Determining whether the elements of an offense involve the release of a force (such as fire or an explosion) that necessarily would damage property is equally straightforward. There is no need to look beyond the elements of the offense for any *quantitative* data that may or may not exist. And even the degree of

qualitative judgment that must be brought to bear is reduced to a minimum.

With respect to determining whether an offense entails purposeful, violent and aggressive conduct demonstrating a likely willingness to harm others, some degree of *qualitative* judgment is unavoidable. Still, this standard also does not depend on (often unavailable) historical data. And the qualitative judgment is guided by the enumerated offenses, which indicate the circumstances that present a risk of harm to another with which the Act is concerned. *See supra* at 16-18 (discussing how burglary and extortion present a risk of confrontation and how arson and use of explosives risk harm to others by unleashing an inherently harmful force).

These two steps—examining whether the predicate offense is (1) a property crime that (2) involves purposeful, violent and aggressive conduct during the commission of the offense—combine to resolve the problem of how to determine whether a crime that is not "analogous" to one of the enumerated offenses should be considered a "violent felony" under the residual subclause. *See James*, 127 S. Ct. 1598 (discussing problem); *id.* at 1601 (Scalia, J., concurring) (same). Once one accepts, as this Court has, that the residual subclause includes *only* crimes that are "similar" in certain respects to the enumerated offenses, *Begay*, 128 S. Ct. at 1584-85, the question of what to do with "nonanaloguous" crimes vanishes. If a crime is not analogous *in the respects that matter*, then the crime is not included within the residual subclause. If the crime is analogous in those respects, then the offense is included.

This approach comports with how this Court resolved both *Begay* and *James*. In *Begay*, this Court

concluded that driving under the influence was not similar to the enumerated offenses because it was a "strict liability" offense. *Id.* at 1588. That is to say, the offense was not analogous to the enumerated offenses in a relevant respect: it "differs from a prior record of violent and aggressive crimes committed intentionally." *Id.*

By contrast, in *James*, this Court concluded that attempted burglary in Florida was analogous in the relevant respects. *James* discussed what about the conduct essential to commit burglary creates a risk of harm to another. 127 S. Ct. at 1594-95. This Court focused on the dangerous circumstances created by that conduct—namely, creating the "possibility of a face-to-face confrontation between the burglar and a third party." *Id.* The opinion does not inquire into the likelihood that harm actually would occur. Rather, it focuses on whether the predicate offense presents the same likelihood of a *confrontation*. This Court concluded that the conduct essential to commit attempted burglary in Florida was analogous to burglary in this respect—both crimes equally create the circumstances that could produce a confrontation, demonstrating that the offender is likely willing to harm others to carry out his plans. *Id.* at 1595-96.

Significantly, the state supreme court had made clear that attempted burglary is a property crime in Florida. As this Court observed, in Florida attempted burglary requires "'an overt act directed toward entering or remaining in a structure or conveyance.'" *Id.* at 1594 (quoting *Jones* v. *State*, 608 So.2d 797, 799 (Fla. 1992)). The conduct encompassed by the elements of attempted burglary in Florida thus involves seeking to invade another's property. This was important to the outcome in *James*, as the Court noted that attempted burglary may not be a violent

felony in those states where the conduct encompassed by the elements of the offense amounts to mere preparation (such as "casing" the building), and does not seek to invade the property of another. *James*, 127 S. Ct. at 1595-96 & n.4.

Petitioner does not contend that his approach will eliminate all the difficulties that can arise in applying the Act. Hard cases likely remain. But petitioner submits that his approach reflects an improvement that will promote the consistent resolution of a great many cases that might otherwise prove difficult and controversial. *Id.* at 1602 (Scalia, J., dissenting) (aspiring to an interpretation of the residual subclause that is "better" even if not "an all-encompassing solution").

2. This Court should seize the opportunity to provide the most thorough guidance to lower courts applying the ACCA (and its corresponding guidelines provision). This is the third case in as many terms in which this Court has agreed to interpret the residual subclause. As members of this Court have observed, efforts to interpret the residual subclause, thus far, have failed to produce a standard that can consistently be applied to the numerous potential predicate crimes that the government seeks to sweep within its scope. *Begay*, 128 S. Ct. at 1585 (observing that the lack of clarity with respect to the degree of risk posed by the enumerated offenses makes it "difficult to accept" that Congress intended the residual subclause to be interpreted as covering all crimes that pose a comparable degree of risk); *James*, 127 S. Ct. at 1598 (suggesting, but not deciding, that the degree of risk posed by crimes covered by the residual subclause may be less than the risk posed by any of the enumerated offenses). In *James*, the Court compared what it perceived to be the relative risks of

burglary and attempted burglary, and concluded that attempted burglary was at least as risky as completed burglary. *Id.* at 1594-96. The dissent, examining precisely the same question, reached the opposite conclusion. *Id.* at 1607-08 (Scalia, J., dissenting). In *Begay*, the concurring and dissenting opinions both focused exclusively on the degree of risk posed by driving under the influence in their respective efforts to determine whether that offense is a "violent felony," and, once again, reached opposite conclusions. *Begay*, 128 S. Ct. 1591-92 (Scalia, J., concurring) (applying the rule of lenity because the government had not provided sufficient data to determine the degree of risk of driving under the influence); *id.* at 1592-94, (Alito, J., dissenting).

These divergent approaches inevitably would be reproduced by the lower courts if this Court were to look to the statistical degree of risk of a predicate offense to determine whether it is a "violent felony." Many, perhaps most, of the predicate crimes that the government seeks to sweep within the ACCA will be asserted in the absence of any data indicating even the number of incidents of harm that occurred as a result of the commission of the offense. *See id.* at 1593 & nn.2, 3 (Alito, J., dissenting) (producing statistics regarding number of alcohol related accidents, along with number of deaths and injuries reported therefrom). Even less frequently will the courts have at their disposal the *rate* of harm, *i.e.*, the ratio of the number of times harm to another resulted and the number of total occurrences of the crime. This is significant because "[w]here the issue is 'risk,' the annual number of injuries from an activity must be compared with annual incidents of the activity." *Id.* at 1591 (Scalia, J., concurring).

Because the government continues to press the ACCA's substantial sentence enhancement into service, lower courts cannot avoid reaching *some* conclusion in the face of critical uncertainty were this Court to require a focus on the degree of risk of the predicate crime.[12] *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (describing this as "an imponderable that cannot be avoided"). As Judge Posner observed below, "it is an embarrassment to the law when judges base decisions of consequence on conjectures." JA 93.

If anything, Judge Posner understated the point. It is more than embarrassing when the application of a criminal provision that determines the permissible range of sentence is left to judicial "conjecture." It is unconstitutional for Congress to permit courts to determine an offender's eligibility for criminal punishment on the basis of standardless, *ad hoc* judgments by trial courts.

First, a rule that permits judges to impose criminal punishment based on their speculation regarding the degree of risk presented by a predicate offense would

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[12] The issue arises not only when the government chooses to enhance a felon-in-possession sentence pursuant to the ACCA. The Sentencing Guidelines also permit application of a "career offender" enhancement based on a guideline that is substantively identical to the definition of "violent felony" in the ACCA. *See* U.S.S.G. § 4B1.2. In addition, there is an "armed career criminal" Guideline that expressly incorporates the ACCA. *See* U.S.S.G. § 4B1.4. In 2007 alone, the government successfully sought an enhancement under the armed career criminal *guideline* enhancement 656 times. U.S. Sentencing Comm'n, *2007 Sourcebook of Federal Sentencing Statistics* tbl.22 (2007). That figure is up from the 292 applications of the enhancement in 2002, just five years earlier. U.S. Sentencing Comm'n, *2002 Sourcebook of Federal Sentencing Statistics* tbl.22 (2002).

be void for vagueness. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) ("Due process requires that all be informed as to what the State commands and forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.") (internal quotation marks and citation omitted). If either the *number* of injuries to another that occur as a result of the conduct involved in failure-to-report escape or the *rate* of such injuries are the facts upon which petitioner's eligibility for the ACCA enhancement turns, then there was no way petitioner could have understood that he was eligible for the enhancement. The fact is that *nobody*, not even the government, knows what those numbers are. The lack of notice regarding the determining factor precludes a judge from speculating that the factor has, in fact, been satisfied.

Permitting judges to impose punishment based on their uninformed, standardless sense of the degree of risk posed by failure-to-report escape, or any other predicate crime with respect to which there is no data, also would violate separation of powers. "[D]efining crimes and fixing penalties are legislative, not judicial, functions." *United States* v. *Evans*, 333 U.S. 483, 486 (1948); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) ("the authority to define and fix the punishment for a crime is legislative"). When a judge, without the benefit of statistical information, simply speculates that the degree of risk of harm is

sufficient, he or she is making law rather than applying it, contrary to the separation of powers.

Because the standard proposed by petitioner meaningfully guides lower courts, it avoids the constitutional concerns raised by an exclusive focus on the (often unknowable) number or rate of incidences of harm to another caused by any particular predicate crime. *Zadvydas* v. *Davis*, 533 U.S. 678, 689 (2001) ("when an act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'").[13] This Court should adopt it.

IV. EVEN IF THE DEGREE OF RISK OF HARM PLAYS SOME ROLE IN DETERMINING WHAT IS A "VIOLENT FELONY," THE ABSENCE OF ANY DATA REGARDING THE RISK EXCLUDES FAILURE-TO-REPORT ESCAPE FROM THE ACCA.

This Court only last term rejected a standard based exclusively on the "degree of risk" posed by the enumerated offenses and the predicate offense. *Begay*, 128 S. Ct. at 1585. The principle of *stare decisis* has special force in cases, like this one, involving the interpretation of a statute. *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-57 (2008) ("*[S]tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done.") (internal quotation marks omitted). But even if the Court continues to

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[13] Another possible way to avoid these constitutional concerns would be the routine, widespread application of the rule of lenity to putative predicate crimes regarding which there is no meaningful data on frequency of harm to others. *See* Argument IV, *infra*.

require some numerical basis to believe that a predicate offense "presents a serious potential risk of harm to another," failure-to-report escape *still* would not be a "violent felony."

The concurring and dissenting opinions in *Begay* offer competing versions of a numerical approach to the residual subclause. The concurrence takes the view that the rate of harm to others from the predicate offense (the number of incidences of harm compared with the number of incidences of the offense) must be at least as high as the rate of harm to others from the least risky enumerated offense. *Begay*, 128 S. Ct. at 1589 (Scalia, J., concurring). The dissent rejects both looking to the *rate* of harm for the predicate offense, and treating the risk of harm from any of the enumerated offenses as a baseline against which the risk of harm from the predicate offense is compared. *Id.* at 1596-97 (Alito, J., dissenting). For the dissent, it is sufficient that a large number of deaths result each year from the conduct involved in the offense, *id.* at 1593 nn.2, 3 (Alito, J., dissenting), and that, in light of that fact, the activity has a large number of "potential victims" and can be said to be a "severe societal problem in large measure because of the very large number of victims it produces each year," *id.* at 1596 (Alito, J., dissenting).

Even if either or both of these sets of numerical considerations were applied, exclusively or in part, there would be no basis to conclude that failure-to-report escape is a "violent felony." As discussed above, the government has produced no data identifying even the number of incidences of harm that result from the conduct essential to commit failure-to-report escape. The absence of such data certainly precludes any way of determining, as per the *Begay* concurrence, the *rate* of harm to others

from the conduct. It likewise precludes drawing any conclusions, as per the *Begay* dissent, about either the number of "potential victims" who are exposed to any danger or whether failure-to-report escape is a "severe societal problem."

The rule of lenity prevents this Court from "interpret[ing] a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); *Begay*, 128 S. Ct. at 1592 (Scalia, J., concurring). Here, there is ample reason to believe that Congress did not intend to enhance the punishment of a felon in possession based on any prior convictions for failure-to-report escape. In addition, it is surely the case that, under any standard advocated by any member of this Court, sweeping failure-to-report escape within the scope of the residual subclause would amount to "no more than a guess as to what Congress intended."

The "venerable" rule of lenity

> not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality opinion). Petitioner should not be subjected to enhanced punishment based on an uncertain application of the ACCA to failure-to-report escape. If Congress wishes to widen the scope of the Act, it, of course, remains free to do so.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PHILIP J. KAVANAUGH
FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT OF ILLINOIS
JULIE MORIAN
650 Missouri Avenue
East St. Louis, IL 62201
(618) 482-9050

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

ROBERT N. HOCHMAN *
BRIAN D. RUBENS
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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